No. 93-415

Supreme Court, U.S.
FILED
SEP 15 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LESLIE HUTCHINSON,
Petitioner,

v.

COMPOSITE STATE BOARD OF MEDICAL EXAMINERS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER A PHYSICIAN WHOSE APPLICATION FOR A MEDICAL LICENSE IS DENIED WITHOUT NOTICE OR HEARING AND THEREAFTER FILES SUIT UNDER THE DUE PROCESS CLAUSE AND 42 U.S.C. § 1983 WITH THE RESULT THAT THE LICENSE IS GRANTED WITHIN DAYS OF FILING THE COMPLAINT IS A "PREVAILING PARTY" UNDER 42 U.S.C. § 1988?

II. WHETHER A FORMAL JUDICIAL ADJUDICATION ON THE MERITS OF A SUIT BROUGHT UNDER 42 U.S.C. § 1983 IS A CONDITION PRECEDENT TO "PREVAILING PARTY" STATUS AND AN AWARD OF ATTORNEY'S FEES UNDER 42 U.S.C. § 1988?

III. WHETHER A DEFENDANT'S CESSATION OF UNCONSTITUTIONAL CONDUCT PRIOR TO A FINAL JUDICIAL ADJUDICATION OF A CLAIM UNDER 42 U.S.C. § 1983 VITIATES ANY NEED FOR THE COURT TO CONSIDER THE MERITS OF THE UNDERLYING CONSTITUTIONAL CLAIM IN THE CONTEXT OF A SUBSEQUENT MOTION FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 1988?

PARTIES TO THE PROCEEDINGS BELOW

The parties to this action are the Plaintiff/Petitioner Leslie Hutchinson and the Defendants State Composite Board of Medical Examiners, and the members of the Board, in their official capacities only. The named members of the Board are: Wilbur E. Baugh; Donald L. Branyon; Thomas J. Busey; Kenneth K. Chase; George M. Chastain; Runette Flowers; F. James Funk; Ellis B. Keener; Jack A. Raines; Elouise B. Sherman; and Irving T. Staley. The individuals named as Defendants are sued in their official capacities as members of the State Composite Board only.

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IN THE

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No. ———

LESLIE HUTCHINSON,

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v.

COMPOSITE STATE BOARD OF MEDICAL EXAMINERS, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leslie Hutchinson ("Hutchinson") hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (App. 1a-3a) is reported at 263 Ga. 186, 429 S.E.2d 661 (1993). The opinion of the state trial court denying Petitioner's motion for attorney's fees under § 1988 (App. 4a-5a) is not reported. The trial court's prior decision granting Hutchinson a Temporary Restraining Order (6a-8a) also is not reported.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on May 17, 1993. A timely motion for reconsideration with was denied by the Georgia Supreme Court

on June 18, 1993. (App. 22a). This petition is filed within ninety days of the entry of the order denying the motion for reconsideration. The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The statute in question in this Petition is 42 U.S.C. § 1988. It provides as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "Civil Rights" and of Title "Crimes", for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The decision of the Georgia Supreme Court encourages and perpetuates a system whereby physicians whose applications for licensure are summarily denied without

notice or hearing—in blatant violation of the Fourteenth Amendment—while simultaneously immunizing the State from an award of attorney's fees when that system is successfully challenged in court via 42 U.S.C. § 1983.

Hutchinson, already licensed as a physician in Ohio and California, initially applied for a Georgia license on or about July 21, 1989. There is no dispute that Hutchinson was qualified, via his education and experience, to receive the requested license.

In February of 1991, the Board took formal action to deny Hutchinson's application for an unrestricted license, via a Board subcommittee voting to issue Hutchinson only a "restricted" license.[1] When Hutchinson refused the Board's offer of a restricted license and was informed that formal denial of the application was imminent, he filed this suit under 42 U.S.C. § 1983, alleging violations of his rights to due process and equal protection under the Fourteenth Amendment. The suit was filed on July 29, 1991.

To protect his interests and prohibit the Board from reporting the denial of his license to various medical information reporting services, Hutchinson moved for a Temporary Restraining Order, also on July 29, 1991. A hearing was held on the motion on July 31, 1991. On August 5, 1991, the trial court issued the temporary restraining order, finding that "there is a substantial likelihood that Plaintiff will prevail on the merits of his due process and equal protection claims" (App. 7a), and ordered that "the Defendants take no further action to

[1] The "restrictions" sought to be imposed by the Board included the following: (a) limiting Hutchinson's work to an "institution" approved of by the Board, and requiring advance Board approval of any change of employment; (b) requiring Hutchinson to provide copies of the restrictions placed on him by the Board to all hospitals and medical facilities with which he was affiliated, as well as any prospective future employers; and (c) a "public" order embodying these restrictions.

deny Plaintiff's license until further order of the Court." (App. 8a).

Within days of the entry of the temporary restraining order (on or before August 12, 1991), the Board voted to simply issue Hutchinson an unrestricted medical license, without the need for any formal hearing. Prior to issuing Hutchinson the license, Hutchinson "appeared" before the Board, with the agreement between Hutchinson and the Board that the "appearance" was not a "hearing", and was without prejudice to Hutchinson's claims in this case.

After the issuance of his license, Hutchinson filed a properly supported motion for attorney's fees and expenses pursuant to 42 U.S.C. § 1988. The trial court found that state statute which specifically authorizes summary denials of license applications (O.C.G.A. § 43-34-38) was constitutionally valid, stating that: "This Court is not persuaded that the statute is unconstitutional." (App. 5a). The trial court also held that the Board was "immune" from an award of attorney's fees under § 1988: "The Court also finds that the Board is immune from any suit for damages, including attorney's fees, for actions taken by them in the performance of their roles as quasi-judicial officials." *Id.*[2]

Hutchinson then appealed the denial of his motion for fees and expenses to the Supreme Court of Georgia, still contending that O.C.G.A. § 43-34-38 was constitutionally invalid, and that he was entitled to an award of fees under § 1988. The Supreme of Georgia disagreed, hold-

[2] In his Brief supporting the motion for attorney's fees before the state trial Court, Hutchinson, citing this Court's decision in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), pointed out that § 1988 does not require any formal judicial adjudication on the merits of a claim under 42 U.S.C. § 1988 in order to justify an award of fees. The same argument was made repeatedly in Hutchinson's briefs to the Georgia Supreme Court. Unfortunately, these references were simply ignored by the Georgia courts.

ing that the issuance the unrestricted license "mooted" any issue of the constitutional validity of O.C.G.A. § 43-34-38, and concluding that Hutchinson was not a "prevailing party" within the meaning of 42 U.S.C. § 1988.[3]

The decision of the Supreme Court of Georgia purports to acknowledge and follow the precedent of this Court in denying Hutchinson "prevailing party" status. The analysis actually applied by the Court, however, is simply not consistent with the precedent of this Court.

In seeking to define the term "prevailing party", the Supreme Court of Georgia looked to this Court's decision in *Farrar v. Hobby*, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992), quoting the following language:

> [A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in any way that directly benefits the plaintiff. [App. 3a].

The Supreme Court of Georgia misconstruing this language, and failing to read it in the context of the decisions which preceded *Farrar*, held that:

> Since [Hutchinson's] § 1983 claim concerned the denial of a hearing to which he claimed a right, *and there has been no adjudication that he has such a right*, it cannot be said that appellant prevailed on the merits of his claim, much less that such relief resulted in the alteration of the parties' relationship. [App. 3a]

Because the decision of the Georgia Supreme Court actually conflicts with *Farrar* and the other precedent of this

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[3] In his Briefs to the state trial court and the Supreme Court of Georgia, Hutchinson persistently argued that a Defendants' decision to cease its unconstitutional conduct after the commencement of litigation did not "moot" the underlying controversy for purposes of § 1988, because the trial court remained bound to assess the legal validity of the underlying claim in order to decide the claim for attorney's fees.

Court defining the term "prevailing party", and because the effect of this decision will undeniably be to discourage litigants from utilizing the state courts to vindicate their federal rights, this Court is urged to grant this Petition and hold that Hutchinson was a "prevailing party" within the meaning of § 1988.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF GEORGIA DENYING HUTCHINSON "PREVAILING PARTY" STATUS IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT INTERPRETING 42 U.S.C. § 1988

The decision of the Supreme Court of Georgia is at odds with all decisions of this Court and the federal courts of appeals construing the term "prevailing party". The central holding of the decision of the lower court is clear: absent a formal, final judicial adjudication of a suit brought under § 1983, the plaintiff can *never* achieve "prevailing party" status. This holding is simply erroneous.

In *Hewitt v. Helms,* 482 U.S. 755, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) this Court held that a party is a "prevailing party" where the lawsuit involves "settling of some dispute which affects the behavior of the defendant towards the plaintiff." In this case, undeniably, this suit induced the Board to simply issue Hutchinson the license he sought.[4] *Hewitt* makes clear that Hutchinson is therefore a "prevailing party":

> If the defendant, under the pressure of the lawsuit, alters his conduct (or threatened conduct) towards

[4] The Supreme Court of Georgia recognized that since the suit was filed, the "legal relationship" between the parties indeed had changed in Hutchinson's favor, noting that "it cannot be denied that the issuance of [Hutchinson's] license materially altered the legal relationship between the parties in a way that directly benefits [Hutchinson]." [App. 3a].

> the plaintiff that was the basis for the suit, the plaintiff will have prevailed. 107 S.Ct. at 2676.

Indeed, *Hewitt* is even more precise in rejecting the notion that a formal legal adjudication is required in order to confer "prevailing party" status:

> [R]elief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that addresses the plaintiff's grievances. 107 S.Ct. 2676

Applying the principle enunciated in *Hewitt*, Hutchinson clearly was not required to obtain a formal judicial declaration that § 43-34-38 was unconstitutional, *i.e.*, that he was entitled to a hearing in the context of his license denial, in order to achieve prevailing party status.

The lower Court's decision likewise flies in the face of this Court's decision in *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). In *Maher*, this Court reiterated that a decision on merits is not required to justify a fee award under § 1988, holding that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."

In *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1980), the Court of Appeals addressed Congress' policy rationale in this area:

> The Act's legislative history evinces a clear Congressional intent to award attorney's fees *even where no final judicial relief is obtained and no final judicial determination is made on any constitutional claim.* The Senate Report explains that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. 652 F.2d at 465. [emphasis added]

This case falls squarely within the holdings in *Hewitt* and *Maher* and *Robinson*: Hutchinson sought licensure as a physician; he was initially denied that license, without notice or hearing, in violation of his due process and equal protection rights under the Fourteenth Amendment. He sued, and successfully secured a TRO prohibiting final denial of the license. Immediately thereafter the Board simply issued Hutchinson the license he sought, without even going through the formality of a hearing. Under these facts, its is impossible to comprehend how Hutchinson can be thought not to be a "prevailing party", and the Board's decision to "moot" Hutchinson's due process claim under § 1983 by capitulating to it does not insulate it from an award of attorney's fees.[5]

As suggested in *Hewitt*, the law is well settled that where a suit is a catalyst which motivates the defendant to cease the complained of conduct, the plaintiff is a "prevailing party" irrespective of subsequent action by the defendant to moot the controversy. "[A] party may be considered to be 'prevailing' if the litigation successfully terminates by . . . a voluntary cessation of the unlawful practice by the defendant . . .". *Martin v. Heckler*, 773 F.2d 1149 (11th Cir. 1985), *quoting*, *Doe v. Busbee*, 684 F.2d 1379 (11th Cir. 1982) ("Analysis hinges upon whether the lawsuit is a substantial factor or a significant catalyst in motivating defendants to end their unconstitutional behavior." *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1560 (11th Cir. 1987), *quoting*, *Busbee*, *supra*. "Mootness does not retroactively divest plaintiffs of prevailing party status". *Taylor*, 810 F.2d at 1560. In this case, Hutchinson's suit clearly was the "catalyst" be-

[5] As *Hewitt* and other cases make clear, the primary issue in the "prevailing party" inquiry is the relief sought and the relief achieved. In this case, the relief sought was a hearing in which Hutchinson could refute any claim that he was not entitled to an unrestricted license. The relief he received, however, far exceeded the relief sought: the Board simply issued the license, without even bothering with a hearing.

hind the Board's ceasing the complained-of conduct. Accordingly, Hutchinson is entitled to an award of fees and expense under § 1988.

The cases are legion in which attorneys fees have been awarded in the wake of voluntary action by the defendant which moots the suit by providing the plaintiff with the requested relief. *Hennigan v. Quachita Parish,* 749 F.2d 1148 (5th Cir. 1985) (plaintiff is prevailing party where she shows that the suit caused the defendant to act unless the defendant proves that the plaintiff's claim had no colorable merit and that the defendant made the change gratuitously for reasons unrelated to the potential merit of suit); *Associated Builders and Contractors v. Orleans School Parish,* 919 F.2d 374 (5th Cir. 1990) (same); *Libby by Libby v. Illinois High School Assn,* 921 F.2d 96 (7th Cir. 1990) (temporary restraining order which causes desired relief can confer prevailing party status); *Jackson v. Galan,* 868 F.2d 165, 168 (5th Cir. 1989) ("It matters little whether the [complained of conduct] ceased specifically because of the preliminary injunction or more generally because of the underlying lawsuit.") *See generally, Luethje v. Peavine School Dist.,* 872 F.2d 352 (10th Cir. 1989); *Grano v. Barry,* 783 F.2d 1104 (C.A.D.C. 1986); *Herrington v. County of Sonoma,* 883 F.2d 739 (9th Cir. 1989); *Rose v. Heintz,* 806 F.2d 389 (2nd Cir. 1986); *Gekas v. Attorney Registration and Disciplinary Comm'n,* 793 F.2d 846 (7th Cir. 1986); *Lovell v. City of Kankakee,* 783 F.2d 95 (7th Cir. 1986). These cases, consistent with *Hewitt* and *Maher,* confirm Hutchinson's status as a prevailing party and his entitlement to an award of fees and expenses.

Respectfully, the lower Court's insistence that a formal judicial adjudication of a claim under § 1983 is a prerequisite to an award of fees under § 1988 is simply incorrect and flies in the face of this Court's settled precedent. For this reason alone, this Court should grant this Petition and hold that Hutchinson is a "prevailing party" within the meaning of § 1988.

II. THE DECISION OF THE SUPREME COURT OF GEORGIA THAT A STATE ACTOR'S UNILATERAL DECISION TO DISCONTINUE ITS UNLAWFUL CONDUCT "MOOTS" THE CONTROVERSY FOR PURPOSES OF § 1988 IS IN DIRECT CONFLICT WITH RELEVANT FEDERAL PRECEDENT.

The decision of the Supreme Court of Georgia is to the effect that where a defendant elects to cease its unlawful conduct short of a formal judicial adjudication, the underlying controversy is somehow "mooted" for purposes of § 1988, and the merits of the underlying claim cannot thereafter be considered in assessing the plaintiff's entitlement to attorney's fees under § 1988. The reasoning appears to be that where the Defendant discontinues the unlawful conduct, the underlying claim is mooted and there can be no formal adjudication of the right in issue, and without a formal adjudication, there can be no award of fees. This holding (and its obvious circular reasoning) is clearly incorrect.

It must be first acknowledged that the state trial court correctly *did* reach the issue of the merits of the underlying claim, stating that "This Court is not persuaded that the statute is unconstitutional." [App. 5a.] The Supreme Court of Georgia, however, inexplicably stated that "We agree with the trial court that the issuance of the license rendered moot all questions in the case other than that of entitlement to attorney's fees." [App. 2a]. The relevant federal precedent is to the effect that a court considering a motion for fees under § 1988 in a case where the defendant ceases the complained-of conduct must nonetheless consider the merits of the underlying civil rights claim for the purpose of ascertaining the plaintiff's entitlement to fees under § 1988. This the Supreme Court of Georgia (unlike the trial court) did not do.

In *Perckett v. Secretary of Health and Human Services*, 905 F.2d 129, 134 (6th Cir. 1988), the Court noted that even where the defendant "moots" the plaintiff's claims,

the Court must nonetheless assess the merits of the claim if for no other purpose than to assess the plaintiff's entitlement to attorney's fees:

> In attorney's fees cases where the court is prevented from reaching the merits of the underlying cause of action because the defendant succumbs, no one doubts the authority of the Court to address so much of the merits as is necessary to determine whether the Plaintiff would have won. 905 F.2d at 134.

In this case, the Board "succumbed" to Hutchinson's constitutional claims prior to a judicial adjudication of the constitutional invalidity of O.C.G.A. § 43-34-38. Consequently, the trial court (and the Supreme Court of Georgia) were obligated to consider the merits of the claim in considering the attorney's fees motion under § 1988. *See, Nash v. Chandler,* 859 F.2d 1210 (5th Cir. 1988). The Supreme Court of Georgia's failure to do so necessitates reversal in this case.

In *Dunn v. Florida State Bar,* 889 F.2d 1010 (11th Cir. 1989), the Court of Appeals held that it was obligated to assess the merits of the Plaintiff's underlying constitutional claims—even though the claims had been "mooted" due to intervening action of the Defendants:

> Our task, therefore, is a difficult one; we must examine prior case law not only to ascertain their holdings and text, but to examine their ramifications, and determine to our own satisfaction that the Constitution could not, under even the most expansive of interpretations, lend color to appellants' claim. 889 F.2d at 1016.

In *Dunn,* the Court meticulously examined the merits of Plaintiff's constitutional attack on certain rules of the Florida State Bar, notwithstanding the intervening technical "mootness" of the claims occasioned by the State Bar's voluntary cessation of the challenged conduct.

In contrast to *Dunn,* (and in contrast to the trial court in this case), the Supreme Court of Georgia refused to

consider the merits of Hutchinson's constitutional claim, even for the limited purpose of ascertaining his entitlement to attorney's fees. This failure appears to result from the mistaken conclusion that "mootness" somehow does away with the need to assess the merits. *Hewitt, Maher, Robinson, Dunn,* and the other cases cited above, however, make clear that a finding of "mootness" does not divest the plaintiff of his or her entitlement to attorney's fees. Nor does it relieve the Court of first instance (or the appellate court) of the duty to assess the merits of Hutchinson's constitutional claim in question, even if only for the limited purpose of properly deciding the attorney's fees question under § 1988.

III. THE SUPREME COURT OF GEORGIA'S NARROW AND INCORRECT READING OF 42 U.S.C. § 1988 WILL DISCOURAGE LITIGANTS FROM SEEKING TO VINDICATE THEIR FEDERAL RIGHTS IN THE STATE COURTS.

It is hornbook law that state courts are required to entertain and adjudicate claims which arise under the federal Constitution and statutes where Congress has not vested exclusive jurisdiction in the federal courts. *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816). Unfortunately, the practical effect of the decision of the Supreme Court of Georgia in this case will be to discourage litigants from seeking resolution of their federal claims in the courts of the State of Georgia.

The niggardly reading of § 1988 afforded by the Georgia Supreme Court can have no effect but to force litigants into federal court, where this Court's pronouncements concerning the scope of § 1988 will be given a more faithful interpretation. Under the relevant federal precedent, a plaintiff is free to accept a defendant's offer to reform his or her conduct to conform with federal law, with the knowledge that (s)he can still recover fees and expenses where appropriate under § 1988. In contrast, in Georgia, a plaintiff is put in the position of being forced

to refuse the Defendant's offer and to insist on a judicial adjudication that the Defendant violated the law. Under these circumstances, no Plaintiff will select a state court forum in which to press his/her federal claims.[6]

CONCLUSION

The decision of the Supreme Court of Georgia simply flies in the face of this Court's settled precedent defining the term "prevailing party". The effect of the Court's decision will be to force all civil rights claims to the federal courts, contrary to the intent of the framers of the Constitution. It is therefore respectfully requested that this Court grant this Petition and hold that Hutchinson is a prevailing party under 42 U.S.C. § 1988.

Respectfully submitted,

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September 15, 1993

[6] This anomaly would be cured, of course, should this Court direct the Georgia Supreme Court to faithfully apply the federal precedent that a formal judicial adjudication of the underlying controversy is not required to justify an award of fees under § 1988.

APPENDIX

APPENDIX

IN THE SUPREME COURT OF GEORGIA

S93A0018

HUTCHINSON

v.

COMPOSITE STATE BOARD OF MEDICAL EXAMINERS, *et al.*

Decided: May 17, 1993

BENHAM, Justice.

Already licensed to practice medicine in Ohio and California, appellant made application for a license to practice in Georgia. Appellees refused appellant an unrestricted license, but offered to enter into a consent order placing restrictions on his license. In response to appellant's demand for a hearing, appellees relied on the provision in OCGA § 43-34-38 that refusal of a license is not a contested case within the meaning of the Administrative Procedure Act, that notice and hearing within the meaning of the Act was not required, but that appellant was entitled by § 43-34-38 to appear before the Board as, indeed, he had already done. Appellant then filed suit against appellees, mounting a constitutional attack on OCGA § 43-34-38 and asserting a claim for relief under 42 U.S.C. § 1983 because of the denial to him of notice and a hearing. The trial court issued a temporary re-

straining order forbidding the Board to deny him a license pending the resolution of the lawsuit. Subsequent to the issuance of that order, appellant made another appearance before the Board which then issued him an unrestricted license. In response to appellant's application for expenses of litigation under 42 U.S.C. § 1988, the trial court first held that the issuance of the license left pending for adjudication only appellant's claim for attorney fees and expenses, and then denied that claim on two bases: that appellant had not shown he was the prevailing party and that appellees had immunity as quasi-judicial officials. This appeal is from that order.

1. We agree with the trial court that the issuance of the license rendered moot all questions in the case other than that of entitlement to attorney fees. Because the issue of entitlement to a hearing can arise in the context of final denial of a license, this is not a situation in which issues, though moot, should be considered because they are capable of repetition, but may evade review. *Chastain v. Baker*, 255 Ga. 432 (339 SE2d 241) (1986). Consequently appellant's enumerations of error concerning his constitutional attack on OCGA § 43-34-38 will not be considered.

2. With regard to the trial court's finding that appellant was not a prevailing party, appellant asserts that application of a "but for" analysis demands the conclusion that the Board issued the license only because appellant filed suit and obtained a TRO. However, the correct standard for determining whether a § 1983 plaintiff prevails is that used by the U.S. Supreme Court in *Farrar v. Hobby*, —— U.S. —— (113 SC 566, 573, 121 LE2d 494) (1992):

> [A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the de-

> fendant's behavior in any way that directly benefits the plaintiff.

In applying that standard, it is essential to bear in mind that the "merits" of appellant's § 1983 claim was not the denial of a license to practice medicine, but the denial of his asserted right to a hearing in the licensing process. Although it cannot be denied that the issuance of appellant's license materially altered the legal relationship between the parties in a way that directly benefits appellant, the record does not show that the alteration resulted from "actual relief on the merits" of appellant's claim. Since appellant's § 1983 claim concerned the denial of a hearing to which he claimed a right, and there has been no adjudication that he has such a right, it cannot be said that appellant prevailed on the merits of his claim, much less that such relief resulted in the alteration of the parties' relationship. It follows that the trial court was correct in ruling that appellant was not the prevailing party. That being so, appellant is not entitled to attorney fees under § 1988 and the trial court's holding regarding appellees' immunity need not be considered.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-92403

LESLIE HUTCHINSON, M.D.,
Plaintiff,

v.

COMPOSITE STATE BOARD MEDICAL EXAMINERS, WILBUR E. BAUGH, M.D., DONALD L. BRANYON, JR., M.D., THOMAS J. BUSEY, JR., M.D., RICHARD K. CHASE, D.O., GEORGE M. CHASTAIN, M.D., RUNETTE FLOWERS, M.D., F. JAMES FUNK, D.O., ELLIS B. KEENER, M.D., JACK A. RAINES, M.D., ELOISE B. SHERMAN, M.D., and IRVING T. STALEY, M.D.,
Defendants.

[Filed June 16, 1992]

ORDER DENYING PLAINTIFF'S MOTION FOR AWARD OF COSTS, EXPENSES, AND ATTORNEY'S FEES

Plaintiff's Motion for Award of Costs, Expenses, and Attorney's Fees came on for a hearing on Tuesday, June 16, 1992. The Court heard oral argument on behalf of the Plaintiff and the Defendants and has reviewed and considered the applicable law and evidence presented by both parties.

This case involves a challenge by the Plaintiff to the current application procedures followed by the Composite State Board of Medical Examiners ("Board"). Judge Langham entered a Temporary Restraining Order on August 5, 1992, and since that time, Plaintiff has been li-

censed by the Board. Therefore, the only remaining justiciable issue is whether Plaintiff is entitled to an award of attorney's fees and expenses.

The Court is not persuaded that Plaintiff is a prevailing party, as required in order to recover atttorney's fees under 42 U.S.C. § 1988.

The Plaintiff argued that O.C.G.A. § 43-34-38 is unconstitutional because it does not provide for a hearing in applicant cases. This Court is not persuaded that the statute is unconstitutional. This Court finds that it was not an impermissible policy for the Board to follow a valid statute. The statute can and should be followed by the Board.

The Court believes that the Composite State Board of Medical Examiners should be free to make decisions, and to change its mind, without the threat of attorney's fees if they do change their mind. The Court finds that the Board is immune from any suit for damages, including attorney's fees, for actions taken by them in the performance of their role as quasi-judicial officials. *See, City of Cave Spring v. Mason,* 252 Ga. 3, 4-5 (1984); *Bettencourt v. Bd. of Reg. in Medicine,* 904 F. 2d 772 (1st Cir. 1990).

Therefore, Plaintiff's Motion for Award of Costs, Expenses, and Attorney's Fees is DENIED. The parties may supplement the record as instructed by the Court at the hearing. Any additions to the record must be filed by no later than June 26, 1992. As there are no other remaining issues, this is the Final Order in this case.

IT IS SO ORDERED.

This 23 day of June, 1992.

/s/ Philip F. Etheridge
PHILIP F. ETHERIDGE
Judge
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-92403

LESLIE HUTCHINSON, M.D.,
Plaintiff,

vs.

COMPOSITE STATE BOARD OF
MEDICAL EXAMINERS, *et al.*,
Defendants.

[Filed August 5, 1991]

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

This matter came on for hearing on Plaintiff's Motion for Temporary Restraining Order on July 31, 1991. The parties were represented by counsel and the court heard argument from both sides. The Court also considered evidence proffered by the Plaintiffs and Defendants, which evidence is attached hereto.

According to the verified complaint, Plaintiff Hutchinson is an M.D. licensed to practice medicine in Ohio and California. He has also applied for a license to practice in the State of Georgia. The Defendants are the Composite State Board of Medical Examiners and the Members of the Board, the entity and individuals charged with applying statutorily prescribed criteria to determine whether applicants for licensure to practice medicine are qualified. Hutchinson contends that the Board has taken official action which might result in the denial of his ap-

plication for licensure and that such action will become final at the next scheduled meeting of the Board (August 7-8, 1991). He also contends that the Defendants have failed to give him notice of the reason(s) justifying the denial or an opportunity to contest any such reason(s).

Plaintiff contends that the lack of notice and hearing are violative of his due process rights under the Fourteenth Amendment to the United States Constitution, as well as violative of the Georgia Constitution. Hutchinson also contends that the distinction in Georgia law between the due process rights afforded physicians, who under the relevant statutes are not entitled to notice or hearing, and the due process rights of attorneys, who under Georgia law are entitled to the full panoply of due process rights, is violative of the equal protection clause of the United States and Georgia Constitutions.

The Defendants contend that the Board has not taken any official action to deny Plaintiff's application. Defendants contend that Plaintiff has been offered a license subject to certain conditions and that he has given notice of the reason for the Board's decision to issue Plaintiff a license subject to those conditions. Defendants also contend that the Board's offer of an appearance before the full Board prior to the Board making a final decision in this matter is sufficient to satisfy the requirements of due process.

Based on the argument of Counsel and the evidence presented at the hearing, the Court FINDS that: (1) Plaintiff is likely to suffer irreparable injury if the temporary restraining order is not granted; (2) There is no adequate remedy at law; (3) There is a substantial likelihood that Plaintiff will prevail on the merits of his due process and equal protection claims; and (4) the Defendants will not suffer significant damage if the Temporary Restraining Order is granted.

With regard to Plaintiff's likelihood of success on the merits, the State must answer the following two ques-

tions: (1) Whether the licensing process in and of itself, based upon the current statutory framework, is constitutionally valid; and (2) Whether Plaintiff has raised a valid question whether an applicant for a medical license is denied equal protection of the laws because he is not afforded the same rights as an applicant for licensure as an attorney.

Based on the above findings, the Court hereby GRANTS Plaintiff's Motion for Temporary Restraining Order and ORDERS the Defendants to take no further action to deny Plaintiff's license until further order of the Court.

Pursuant to O.C.G.A. § 9-11-4(j), and by agreement of the parties, the Court also ORDERS that Plaintiff be allowed to serve the individual Board members by a process server employed by Plaintiff.

It is so ordered this 5th day of August, 1991 at 2:15 o'clock, p.m.

/s/ Don A. Langham
DON A. LANGHAM
Judge
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D92403

LESLIE HUTCHINSON, M.D.,
Plaintiff,

vs.

COMPOSITE STATE BOARD OF MEDICAL EXAMINERS,
Defendant.

[Filed July 29, 1991]

COMPLAINT

NOW COMES, Leslie Hutchinson, M.D., Plaintiff in the above-referenced action and hereby states his complaint against the above-named Defendant on the following grounds:

JURISDICTION

1.

The jurisdiction of this Court is invoked pursuant to 42 U.S.C. §§ 1983, 1988, the Fourteenth Amendment to the United States Constitution, and Article 1, Section 1, Paragraphs 1 and 2 of the Georgia Constitution.

VENUE

2.

Venue is properly laid in this Court in that Defendant resides in Fulton County and the conduct complained of occurred in Fulton County.

PARTIES

3.

The Defendant, Composite State Board of Medical Examiners (the "Board"), is an administrative agency of the State of Georgia subject to suits of this kind and nature. The Board is the agency designated by the State of Georgia "to examine applicants to test their qualifications to practice medicine." The Board may be served through its Executive Director, Andrew Watry, at 166 Pryor Street, Atlanta, Georgia 30303. Once served the Board will be subject to the jurisdiction of this Court.

4.

Plaintiff, Leslie Hutchinson, M.D., is a resident of the State of Georgia entitled to bring actions of this kind and nature.

FACTUAL ALLEGATIONS

5.

Plaintiff Hutchinson possesses an unrestricted license to practice medicine in the States of Ohio and California. He was initially licensed in Ohio on June 27, 1988, and was licensed in California on February 22, 1989.

6.

On or about July 21, 1989, Hutchinson filed with the Board his application for a license to practice medicine in the State of Georgia.

7.

Hutchinson possesses all necessary qualifications, educational and experiential, required to practice medicine in the State of Georgia.

8.

O.C.G.A. § 43-34-35 provides that "The board *shall* issue licenses to practice medicine to all persons who shall furnish satisfactory evidence of attainments and qualifications under this chapter and the rules and regulations of the Board." [emphasis added]

9.

O.C.G.A. § 43-34-37(a) specifies the reasons for which an application to practice medicine may be denied. That section provides that "The board shall have authority to refuse to grant a license to an applicant . . . *upon a finding*" that the applicant has committed conduct falling into any one of thirteen enumerated classifications. [emphasis added]

10.

O.C.G.A. § 43-34-37(b)(1) provides that "When the board *finds that any person is unqualified to be granted a license . . . pursuant to subsection (a) of this Code section*, the board may take any one or more of the following actions: (A) refuse to grant a license to an applicant."

11.

Plaintiff Hutchinson has committed none of the proscribed conduct enumerated in § 43-34-37(a) and is entitled to be granted a license to practice medicine in the State of Georgia.

12.

Board Rule 360-2-.09 provides that "The Board has the power to refuse or revoke a license *for cause*." [emphasis added].

13.

Board Rule 360-2-.09 provides that "The Board has the authority to refuse to grant a license to an applicant . . . if that physician has engaged in unprofessional

conduct. For purposes of enforcement of this rule, unprofessional conduct is defined as, but not limited to, practicing or aiding in . . ." eleven enumerated classifications of proscribed conduct.

14.

Plaintiff Hutchinson has not engaged in "unprofessional conduct" as defined by the Board and is entitled to be granted a license to practice medicine in the State of Georgia.

15.

While considering Hutchinson's application, the Board directed him to undergo a medical assessment at an institution chosen by the Board, but at Hutchinson's expense. Hutchinson complied, submitting to a 72 hour medical examination.

16.

During the assessment, Hutchinson was examined by three physicians. At the conclusion of the examination, each physician concluded that Hutchinson was fully qualified to practice medicine in the State of Georgia and should be granted a license.

17.

Despite Hutchinson's qualifications to practice medicine in the State of Georgia and contrary to the results of the examination it ordered, the Board has taken formal action to deny Hutchinson an unrestricted license to practice medicine.

18.

O.C.G.A. § 43-35-37(a)(5) provides that denial of an application to practice medicine by "any lawful licensing authority" constitutes cause for disciplinary action against licensed physicians in the State of Georgia and constitutes cause to deny the application of the prospective licensee.

19.

By denying Hutchinson's application, the Board has necessarily concluded that Hutchinson is "unqualified" to practice medicine, and has thereby subjected Hutchinson to possible disciplinary action in California and Ohio due to those states' counterpart regulations to O.G.G.A. § 43-35-37(a)(5).

20.

O.C.G.A. § 43-34-38 provides that "refusal of a license shall [not] be considered a contested case within the meaning of Chapter 13 of Title 50, and notice and hearing within the meaning of such chapter shall not be required . . .". Based on this statute the Board has refused to give Hutchinson notice of the reason(s) upon which it has concluded he is "unqualified" to practice medicine and has denied him of any hearing in which to challenge said reason(s).

21.

O.C.G.A. § 43-34-38's absolute denial of notice and a hearing for an applicant such as Hutchinson is contrary to and inconsistent with O.C.G.A. §§ 43-34-37(13)(A), which guarantees to an applicant the right to notice and hearing in cases where the applicant has "failed to submit to" a medical examination ordered by the Board. To the extent that applicants are entitled to notice and hearing in cases of failure to submit to a medical examination, but not in other cases, the distinction in the law is arbitrary and capricious and is not founded on any rational relationship to the purpose of laws.

22.

O.C.G.A. § 43-34-38's denial of notice of the reason for the rejection and the denial of hearing to challenge the denial of a license is inconsistent with the language of O.C.G.A. § 43-34-37(e) and (f), which refer to "any hearing to determine the licensee's *or applicant's* fitness to practice medicine." [emphasis added]

23.

Applicants for licenses to practice law whose applications are denied for reasons similar to those set forth in O.C.G.A. § 43-34-37 and Board Rule 360-2-.09 are entitled under Georgia Law to notice of the reason(s) justifying said denial and a hearing in which to challenge said reason(s).

24.

Any distinction between the due process rights of applicants for licenses to practice medicine and the due process rights of applicants for licenses to practice law is arbitrary and capricious and not rationally related to any legitimate purpose.

25.

As a result of Defendant's violation of Plaintiff's federal and state constitution rights, Plaintiff is suffering irreparable harm in the form of injury to his professional standing and reputation and the prospect of disciplinary action in Ohio and California based on the Board's denial of his license.

SUBSTANTIVE ALLEGATIONS

COUNT ONE: § 1983 DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW

26.

Under the governing statutes, Plaintiff Hutchinson's application for unrestricted licensure could be denied only "for cause". As a result, having demonstrated his qualifications for an unrestricted license, he possesses a property interest in the issuance of the unrestricted license.

27.

Prior to taking final action to deny Hutchinson a license, the Board is constitutionally required to give him notice of the reason(s) why, and to provide him a full

evidentiary hearing to challenge said reason(s), O.C.G.A. § 43-34-38 notwithstanding.

28.

The denial of Hutchinson's license was not accompanied by notice of the reason for the denial or any hearing in which to challenge said reason, due to O.C.G.A. § 43-34-38.

29.

The denial of Plaintiff's application is unsupported by any evidence, is contrary to the results of the examination the Board itself ordered, and is arbitrary and capricious.

30.

O.C.G.A. § 43-34-38 violates Plaintiff's federal constitutional right to substantive and procedural due process of law, and Defendant, the state agency applying the statute, has violated, under color of state law, Hutchinson's Fourteenth Amendment Right to due process of law.

COUNT TWO: § 1983 VIOLATION OF PLAINTIFF'S LIBERTY WITHOUT DUE PROCESS OF LAW

31.

Plaintiff Hutchinson's liberty, within the meaning of the Fourteenth Amendment, includes his right to pursue the common occupations of life.

32.

Plaintiff Hutchinson's pursuit of license to practice medicine constitutes a liberty interest protected by the Fourteenth Amendment.

33.

Prior to taking final action to deny Hutchinson's license, the Board is constitutionally required to give him notice of the reason(s) why and to provide him a full

evidentiary hearing to challenge said reason(s), O.C.G.A. § 43-34-38 notwithstanding.

34.

O.C.G.A. § 43-34-38 violates Plaintiff's federal constitutional right to due process of law, and Defendant, the state agency responsible for applying the statute has thereby violated, under color of state law, Hutchinson's Fourteenth Amendment Right to substantive and procedural due process of law.

35.

The denial of Plaintiff's application is unsupported by any evidence, is contrary to the results of the examination the Board itself ordered, and is arbitrary and capricious.

36.

In connection with the summary denial of Plaintiff's application, Defendant will publish false and stigmatic statements to the effect that Plaintiff is "unqualified" to practice medicine, and said statements will cause Plaintiff to suffer irreparable harm in the form of injury to his professional standing and reputation and possible disciplinary proceedings against him in Ohio and California.

37.

The Board, acting under color of state law, has thereby violated Hutchinson's Fourteenth Amendment right to due process of law.

COUNT THREE: § 1983 VIOLATION OF PLAINTIFF'S RIGHT TO EQUAL PROTECTION UNDER THE LAW

38.

The distinction between the due process rights of applicants seeking licenses as attorneys and the due process rights of applicants seeking licenses to practice medicine

is arbitrary and capricious and is unrelated to any legitimate purpose.

39.

The distinction between the due process rights of physicians denied licenses for failing to submit to required medical examinations and the due process rights of these physicians whose applications are denied for other reasons is arbitrary and capricious and is not rationally related to any legitimate purpose.

40.

O.C.G.A. § 43-34-38 therefore violates Plaintiff's constitutional right to equal protection under the law, and in this case. Defendant, the state agency responsible for applying the statute, has violated, under color of state law, Hutchinson's Fourteenth Amendment Right to equal protection under the law.

41.

Upon information and belief, the Board has granted licenses to other physicians whose qualifications are equal or lesser to these possessed by Hutchinson.

42.

The Board's unexplained denial of Plaintiff's license violates his right to equal protection based on his granting of licenses to similarly situated physicians.

COUNT FOUR: DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE GEORGIA CONSTITUTION

43.

Plaintiff Hutchinson's application for licensure could be denied only "for cause". As a result, he possessed a property interest in the issuance of his license.

44.

The denial of Hutchinson's license was constitutionally required to have been preceded by notice and a full evidentiary hearing, O.C.G.A. § 43-34-38 notwithstanding.

45.

The denial of Hutchinson's license was not accompanied by notice of the reason for the denial or any hearing in which to challenge said reason.

46.

O.C.G.A. § 43-34.38 violates Plaintiff's state constitutional right under Article 1, Section 1, Paragraph 1 of the Georgia Constitution, to due process of law, and Defendant, the state agency responsible for applying the statute, has violated Hutchinson's Fourteenth state law right to due process of law.

COUNT FIVE: VIOLATION OF PLAINTIFF'S LIBERTY WITHOUT DUE PROCESS OF LAW UNDER THE GEORGIA CONSTITUTION

47.

Plaintiff Hutchinson's liberty, within the meaning of Article 1, Section 1, Paragraph 1 of the Georgia Constitution includes his right to pursue the common occupations of life.

48.

Plaintiff Hutchinson's pursuit of a license to practice medicine constitutes a liberty interest protected by Article 1, Section 1, Paragraph 1 of the Georgia Constitution.

49.

Prior to taking action to deny Hutchinson's application, the Board was required under the State Constitution to give him notice of the reason(s) why and to provide him

a full evidentiary hearing to challenge said reason(s), O.C.G.A. § 43-34-38 notwithstanding.

50.

O.C.G.A. § 43-34-38 violates Plaintiff's state constitutional right to due process of law, and Defendant, the state agency responsible for applying the statute, has, in applying it, violated Hutchinson's state law due process rights.

51.

In connection with the denial of Plaintiff's application, Defendant has published false and stigmatic statements to the effect that Plaintiff is "unqualified" to practice medicine, and said statements have caused Plaintiff to suffer irreparable harm in the form of injury to his professional standing and reputation and in the form of the likely commencement of disciplinary proceedings against him in Ohio and California.

52.

The Board has thereby violated Hutchinson's state law rights to due process of law.

COUNT SIX: VIOLATION OF PLAINTIFF'S RIGHT TO EQUAL PROTECTION UNDER THE LAW UNDER THE GEORGIA CONSTITUTION

53.

The distinction between the due process rights af applicants seeking licenses as attorneys and the due process rights of applicants seeking licenses to practice medicine is arbitrary and capricious and is unrelated to the purpose of the law.

54.

The distinction between the due process rights of physicians whose applications are denied for failing to

submit to a medical examination and the due process rights of physicians whose licenses are denied for other reasons, is arbitrary and capricious and not rationally related to the purpose of the laws.

55.

O.C.G.A. § 43-34-38 therefore violates Plaintiff's right to equal protection under the law as guaranteed by Article 1, Section 1, Paragraph 2 of the Georgia Constitution, and in this case, Defendant, the state agency responsible for applying the statute, has violated Hutchinson's Right to equal protection under the law.

COUNT SEVEN: VIOLATION OF PLAINTIFF'S RIGHT UNDER 29 U.S.C. § 794 and O.C.G.A. § 34-6A-4

56.

To the extent that the Board's unexplained license denial is based on any perception that Hutchinson is handicapped, the denial constitutes unlawful discrimination prohibited by 29 U.S.C. § 794 and O.C.G.A. § 34-6A-4.

WHEREFORE, Plaintiff demands judgment as follows:

(1) That Defendant be temporarily and preliminarily enjoined from taking or purporting to take any final action relative to Plaintiff's application for licensure until such time as it has given Plaintiff notice of the reason(s) upon which the Board intends to deny his license and until Defendant has afforded Plaintiff a full evidentiary hearing before an impartial tribunal other than the Board in which to challenge said reason(s);

(2) That Defendant be temporarily and preliminarily enjoined from communicating any information to other agencies or individuals relative to Plaintiff's application for licensure until such time as Plaintiff has been afforded

notice of the reason(s) for the denial of his license and been afforded a full evidentiary hearing in which to challenge said reason(s);

(3) That OC.G.A. § 43-34-38 and § 43-34-37(13)(A) be declared null and void as facially violative of the federal and state due process and equal protection rights of all physicians, including the Plaintiff, who apply for licensure to practice medicine in the State of Georgia;

(4) That Plaintiff be awarded reasonable attorney's fees and expenses incurred in bringing and prosecuting this action as authorized by 42 U.S.C. § 1988;

(5) Such other and further relief as the Court deems just and fair.

Respectfully submitted this 29 day of July, 1991.

/s/ John J. Goger
JOHN J. GOGER, Esq.
State Bar No. 299050

/s/ Harlan S. Miller
HARLAN S. MILLER, III, Esq.
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IN THE SUPREME COURT OF GEORGIA

Case No. S93A0018

LESLIE HUTCHINSON

v.

COMPOSITE STATE BOARD OF MEDICAL EXAMINERS

Decision date: MAY 17, 1993
MFR Filing Date: MAY 26, 1993

MOTION FOR RECONSIDERATION

Vote: All the Justices concur.

Deny Date: June 18, 1993.

VOTE: